STATE OF MICHIGAN

COURT OF APPEALS

DONALD KLEINEBREIL and KATHERINE KLEINEBREIL,

Plaintiffs-Appellants,

v

MICHAEL PREZZATO, RICHARD PREZZATO, PREZZATO BUILDERS, PREZZATO CONTRACTING, and PREZZATO CONTRACTING INC.,

Defendants-Appellees.

UNPUBLISHED
December 11, 2003

No. 242740
Saginaw Circuit Court
LC No. 00-035013-NO

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Plaintiffs Donald and Katherine Kleinebreil[1] appeal as of right the trial court's order granting defendant Prezzato's[2] motion for summary disposition under MCR 2.116(C)(10). Kleinebreil, an employee of Robertson Excavating, was injured when the trench in which he was working collapsed. He then sued Prezzato, the general contractor, for negligence. Because Kleinebreil failed to set forth evidence showing that any of the exceptions to the general rule that general contractors are not liable for their independent contractors' negligence applied, we affirm.

I. Basic Facts And Procedural History

Kleinebreil was a construction worker employed by Robertson Excavating, which had been hired by the general contractor, Prezzato, to work on a new residential subdivision called Robin Meadows. On August 27, 1997, Kleinebreil was installing water and sewer lines inside a trench when the trench collapsed, causing Kleinebreil serious injuries. As a result, Kleinebreil

[1] Because Katherine Kleinebreil's claim was derivative in nature, for ease of reference, this opinion uses "Kleinebreil" to refer to Donald Kleinebreil as well as plaintiffs collectively.

[2] For ease of reference, this opinion refers to defendants Michael Prezzato, Richard Prezzato, Prezzato Builders, Prezzato Contracting, and Prezzato Contracting, Inc. collectively as "Prezzato" unless otherwise indicated.

filed a negligence claim alleging that Prezzato breached its duty to use reasonable care by failing to ensure that Robertson Excavating conducted the trenching operation in accordance with the Michigan Occupational Safety and Health Act, local ordinances, state law, and the BOCA national building code; by failing to adequately test the soil, shoring system, and access to the trench; and by failing to employ qualified people to design, construct, and maintain the shoring system of the trench.

Prezzato moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) on the basis that Prezzato, as the general contractor, was not responsible for injuries to employees of its subcontractor, Robertson Excavating, and that the three exceptions to the rule of general-contractor nonliability—the doctrines of the common work area, retained control, and inherently dangerous activity—were not alleged to be applicable in Kleinebreil's complaint and, in any event, were inapplicable based on the facts. Kleinebreil responded that the complaint adequately invoked the retained control doctrine by alleging that Robertson Excavating was working "at the request and direction of" Prezzato, and argued that there were factual questions respecting the applicability of the other two exceptions to nonliability. Kleinebreil also argued that Prezzato should be held liable for failing to hire a competent and responsible subcontractor. Accordingly, Kleinebreil requested the trial court to deny the motion for summary disposition and allow Kleinebreil to amend the complaint "to more specifically allege the claims against" Prezzato.

After a hearing, the trial court concluded that the common work area exception was inapplicable because Robertson Excavating was the only subcontractor that worked in the trench. The trial court also concluded that the retained control exception was inapplicable in light of deposition testimony from the owner of Robertson Excavating, who explained that he directed his own activities. The owner further testified that Prezzato did not recommend any safety procedures or tell him how to do his job, apart from telling him where to put the water and sewer lines. Finally, the trial court declined to address the inherently dangerous activity exception because nothing in Kleinebreil's complaint indicated that an inherently dangerous activity was involved. Without ruling on Kleinebreil's motion to amend the complaint, the trial court granted the motion for summary disposition under MCR 2.116(C)(10).

Kleinebreil filed a motion for reconsideration under 2.119(F) on the basis that a question of fact existed requesting whether Kleinebreil was engaged in an inherently dangerous activity when he was injured, and that he should therefore be permitted to amend his complaint to include that allegation. The trial court denied the motion for reconsideration, but stated that it would entertain a request to amend the complaint if a motion to amend were filed. Rather than filing a motion to amend with the trial court, however, Kleinebreil appealed the orders granting summary disposition and denying the motion for reconsideration to this Court.

II. Summary Disposition

A. Standard Of Review

We review de novo the trial court's decision on a motion for summary disposition.[3]

B. Kleinebreil's Burden Under MCR 2.116(C)(10)

To successfully oppose a motion under MCR 2.116(C)(10), the nonmoving party may not rely on mere allegations or denials, but must set forth evidence of specific facts showing that a genuine factual issue exists.[4] In evaluating the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion.[5] The trial court may only consider "the substantively admissible evidence actually proffered in opposition to the motion," and may not deny the motion on "the mere possibility that the claim might be supported by evidence produced at trial."[6] If the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.[7]

C. Exceptions To General Contractor Nonliability

Ordinarily, a general contractor who employs an independent contractor is not liable for the independent contractor's negligence or the negligence of his employees.[8] However, this Court has recognized three exceptions to the general rule of nonliability: "(1) when the general contractor retains control over the work, (2) where there are readily observable and avoidable dangers in common work areas that create a high degree of risk to a significant number of workers, and (3) where the work is inherently dangerous."[9] We will address each in turn.

D. Retained Control

Kleinebreil argues that evidence supports holding Prezzato liable under the retained control doctrine, which provides that a general contractor "may be held liable for a subcontractor's negligence where the general contractor or landowner effectively retains control over the work involved."[10] In support of his position, Kleinebreil relies on the deposition testimony of Duane Robertson, owner of Robertson Excavating, that Robertson would contact

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[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[4] *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).

[5] MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[6] *Maiden*, *supra* at 121.

[7] MCR 2.116(C)(10), (G)(4); *Quinto*, *supra* at 362.

[8] *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999).

[9] *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 173; 660 NW2d 730 (2003) (citations omitted).

[10] *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994).

one of the Prezzatos if he had a problem on the work site, and that both Michael and Richard Prezzato had given him a cell phone number for that purpose. However, even viewing this testimony in the light most favorable to Kleinebreil, there is nothing to suggest that, by providing a telephone number where they could be reached, the Prezzatos effectively controlled the manner in which Robertson worked. Indeed, Robertson specifically testified that he, not Prezzato, directed the activity in the trench, and agreed that Prezzato did not tell him "how to set your grade or how to dig your trench or how to shore your trench."

Moreover, "[a] general contractor must exercise a 'high degree of actual control' to be liable under this theory; general oversight or monitoring is insufficient."[11] To meet this standard, the general contractor's retention of control must have had "'some actual effect on the manner or environment in which the work was performed.'"[12] Kleinebreil provided no evidence that Prezzato had any effect on the manner in which the excavation work was performed. Because there was no evidence to suggest that Prezzato retained control over Robertson's excavation operation, we conclude, as a matter of law, that the retained control doctrine is inapplicable. Accordingly, the trial court properly granted summary disposition of this issue.[13]

E. Common Work Area

Kleinebreil next argues that the trial court erred in granting summary disposition because he was injured in a common work area. A work area is considered to be "common" if the employees of two or more subcontractors will eventually work in it.[14] Kleinebreil maintains that "Robertson, inspectors from the Township, persons from Miss Dig or Ameritech, roofers, an employee of the general contractors, and at least one of the Defendants" "could have been exposed to this dangerous condition by either walking, standing, or inspecting the area where the excavation occurred." However, apart from being purely speculative, Kleinebreil's assertion only names individuals that might find themselves near the trench; it does not indicate that any employee of another subcontractor will actually work in the trench area. This is a prerequisite to a finding of a common work area.[15]

Even if the trench could be considered a common work area, Prezzato is not necessarily liable for Robertson Excavating's alleged negligence. A general contractor only has a duty "to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen."[16] Thus, "[t]he mere presence of a common work

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[11] *Ormsby*, *supra* at 185, quoting *Phillips*, *supra* at 408.

[12] *Ormsby*, *supra* at 183, quoting *Candelaria*, *supra* at 76.

[13] See *Quinto*, *supra* at 362.

[14] See *Phillips*, *supra* at 408.

[15] See *id*.

[16] *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

area, without supervisory control by the general contractor and a readily observable and avoidable risk to a significant number of workers, will not necessarily impose liability."[17] Because there was no evidence that any other subcontractors, much less a "significant number of workers," would be working in or near the trench, we conclude that the common work area doctrine is inapplicable as a matter of law. Accordingly, the trial court properly granted summary disposition of this issue.[18]

F. Inherently Dangerous Activity

Finally, Kleinebreil argues that the work he was contracted to perform is an "inherently dangerous activity," which is the third exception to the rule of general contractor nonliability.[19] An "inherently dangerous activity" includes "work 'necessarily involving danger to others, unless great care is used' to prevent injury,"[20] or work involving a "'peculiar risk' or 'special danger' which calls for 'special' or 'reasonable' precautions."[21] To support the contention that his work fit this definition, Kleinebreil asserts only that he was working inside a trench that collapsed while he was working "without the benefit of protective devices." The statement of facts further includes an assertion that Robertson Excavating "was not using any shoring techniques, nor did he cut back the banks consistent with the proper angle of repose, in violation of MIOSHA and OSHA requirements."

However, it is well established that, under the inherently dangerous activity doctrine, "'liability should not be imposed where the activity involved was not unusual, the risk was not unique, "reasonable safeguards against injury could readily have been provided by well-recognized safety measures," and the employer selected a responsible, experienced contractor.'"[22] In this case, Kleinebreil offers no facts supporting the conclusion that working in a trench is unusual, or has unique risks.[23] Rather, Kleinebreil asserts that the existence of regulations pertaining to trench work indicates that it must be inherently dangerous. In our view, this fact indicates only that well recognized safety measures existed to provide reasonable safeguards against trench collapse, placing Kleinebreil's claim outside the purview of the

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[17] *Groncki v Detroit Edison Co*, 453 Mich 644, 663; 557 NW2d 289 (1996).

[18] See *Quinto*, *supra* at 362.

[19] *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985).

[20] *Id*. at 727, quoting *Inglis v Millersburg Driving Ass'n*, 169 Mich 311; 136 NW 443 (1912).

[21] *Id*. at 727-728, quoting 2 Restatement Torts, 2d, §§ 416, 427.

[22] *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich App 541, 548-549; 536 NW2d 221 (1995), quoting *Szymanski v K Mart Corp*, 196 Mich App 427, 431-432; 493 NW2d 460 (1992), vacated and remanded on other grounds 442 Mich 912 (1993), quoting *Funk*, *supra* at 110.

[23] In his statement of facts, Kleinebreil asserts, without support, that "the Defendants in this case failed to hire a competent and responsible contractor." Apart from its improper inclusion in the statement of facts, MCR 7.212(C)(6), and its absence from the statement of questions presented, see *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000), the issue was not adequately briefed, and therefore we decline to address it. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

inherently dangerous activity doctrine.[24] Accordingly, we conclude that the trial court did not err in denying Kleinbreil's motion for reconsideration on this ground, and that amending the complaint to include a claim under this exception would have been futile.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio

[24] See *Rasmussen*, *supra* at 549.